YOGANANTHY AS THAMBAIYA *a*

v.

IDRIS OSMAN

HIGH COURT MALAYA, JOHOR BAHRU *b*
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-160-1995(1)]
26 FEBRUARY 2002

CIVIL PROCEDURE: *Action - Reinstatement - Action struck out due to absence of plaintiff and counsel at hearing - Whether absence due to mistake - Whether absence intentional and contumelious - Whether reinstatement prejudicial to defendant - Whether against public interest* *c*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Whether defendant breached provisions of O. 42 r. 8 of the Rules of the High Court 1980 - Whether draft order invalid due to failure to comply with form 79(K) of Appendix A of the Rules of the High Court 1980 - Whether court functus officio - Rules of the High Court 1980, O. 2, O. 42 r. 8(1), (3), form 79(K) - Interpretation Acts 1948 & 1967, s. 62* *d*

The plaintiff filed two applications before this court. The first application ('encl. 92') prayed for reinstatement of an action pursuant to O. 35 r. 1 of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court, and the setting aside of the judgment given to the defendant on his counterclaim pursuant to O. 35 r. 2 of the RHC. The second application ('encl. 96') was for a stay of execution of the judgment pending the hearing and final disposal of encl. 92. *e* *f*

The plaintiff, who was absent from the hearing, contended that her absence was due to a miscommunication between the parties, and that was neither intentional nor contumelious. She further submitted that the defendant had failed to adhere to the explicit requirements of O. 42 r. 8 of the RHC by forwarding the draft order to the registrar for approval when it had notice of the plaintiff's request for an appointment with the registrar to clarify the terms of the order given, which resulted in depriving the plaintiff of its rights under the RHC. The plaintiff also contended that the draft order was invalid due to a failure to comply with form 79K of Appendix A of the RHC. *g* *h*

Held:

[1] From the available evidence, the plaintiff had failed to satisfactorily show that her absence from the trial was accidental and due to a mistake. The lackadaisical attitude and contemporary conduct in the particular *i*

circumstances of the case herein could not support her reason that her absence was not intentional and contumelious. Although the plaintiff acted rather promptly in applying to set aside the judgment, it could not count positively in favour of acceding because of her contemporary conduct which made her undeserving of the court's sympathy. The factor of prejudice to the defendant was again a consideration which went against accommodating the plaintiff, and public interest demanded that there be a finality to litigation more so after an adjudication had been made on the matter. (p 544 e-h)

[2] Having failed to comply with the requirements of O. 42 r. 8(1) of the RHC, the plaintiff's solicitors could not avail himself of having the matter being settled by the registrar/judge as prescribed by O. 42 r. 8(3) of the RHC as the prerequisites for settlement before the registrar/judge had not been fulfilled by him. He could not insist that the draft orders be fixed for settlement by the registrar when the deletion *in toto* could not by any stretch of imagination be termed as an amendment. The right to clarify the terms of an order as enshrined in O. 42 r. 8(3) of the RHC is a legal right exercisable only to a party which has fulfilled and complied strictly with the express requirements thereto. (pp 546 g-h & 547 b-c)

[3] The *functus officio* argument did not arise for consideration as the deviation from the said form amounted to an irregularity that was curable by virtue of O. 2 of the RHC, and in view of s. 62 of the Interpretation Acts 1948 & 1967, the usage of the wrong form had no substantial effect and was not calculated to mislead. As there was no injustice caused to the plaintiff, the court had the power to amend mistakes or omissions. (p 548 c-d)

[Applications dismissed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 ***(refd)***
Buga Singh v. Koh Bon Keo [1967] 1 MLJ 16 ***(refd)***
Burgoine v. Taylor [1878] 9 Ch D 1 ***(refd)***
Cheah Thean Swee v. OUB [1989] 1 MLJ 426 ***(refd)***
Cockle v. Joyce [1877] Ch D 56 ***(refd)***
Delcont (M) Sdn Bhd v. Motor Sport International Ltd [1996] 1 CLJ 450 ***(refd)***
Gathi v. Shoosmith [1939] 3 All ER 916 ***(refd)***
Grovit & Ors v. Doctor & Ors [1997] 2 All ER 417 ***(refd)***
Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 ***(refd)***
Malayan Banking Bhd v. Syed Mansor Syed Salim [1999] 6 CLJ 578 ***(refd)***
Mohd Yusof Mohamad v. Electrolux Home Centers Sdn Bhd [1999] 2 CLJ 866 ***(refd)***
Negara Properties Sdn Bhd v. Arkitek Bersekutu Malaysia [1996] 2 CLJ 923 ***(refd)***

Omega Securities Sdn Bhd v. Public Bank Bhd [1999] 1 CLJ 216 ***(refd)***
Palata Investments Ltd & Ors v. Burt and Sinfield Ltd & Ors [1984] 1 MLJ 188 ***(refd)***
Schafer v. Blyta [1920] 3 KB 140 ***(refd)***
Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 ***(refd)***
Shocked v. Goldschmidt [1998] 1 All ER 372 ***(refd)***
Soo Lina v. Ngu Chui Chingon (Chong Oi Khiem Irene, Co-respondent) [1992] 2 MLJ 870 ***(refd)***
Tractor's Malaysia Berhad v. Southern Eastern Sdn Bhd & Anor [1984] 1 MLJ 118 ***(refd)***

Legislation referred to:
Interpretation Act 1967, s. 62
Legal Profession (Practice & Etiquette) Rules 1978, r. 56
Rules of the High Court 1980, O. 1 r. 7, O. 2, O. 32 r. 13(2)(b), O. 35 rr. 1(2), 2, O. 42 r. 8(1), (3), form 79(k)

Other source(s) referred to:
Mallal's Supreme Court Practice, p 7

For the plaintiff - Asmet Nasruddin; M/s Puthucheary Firoz Asmet & Mai
For the defendant - PK Nathan (Mala Nathan & Fadzillah Mansor); M/s PK Nathan & Co

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy JC:
There are two applications filed by the plaintiff before this court – namely summons in chambers dated 17 October 2000 in encl. 92 praying for reinstatement of the action pursuant to O. 35 r. 1 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court and setting aside of the judgment dated 16 October 2000 given to the defendant on his counterclaim pursuant to O. 35 r. 2 of the Rules of the High Court 1980 and secondly by way of a summons in chambers dated 20 October 2000 in encl. 96 for a stay of execution of the judgment dated 16 October 2000 pending the hearing and final disposal of encl. 92.

The evidence relating to the determination of the applications herein are to be found in nine affidavits – seven filed in support of the plaintiff's application and two filed by the defendant in opposition.

The evidence supportive of the plaintiff's application are contained in the following affidavits, namely:

1. Plaintiff's affidavit affirmed on 19 October 2000 (encl. 95)

2. Plaintiff's affidavit affirmed on 19 October 2000 (encl. 110)

3. Plaintiff's affidavit affirmed on 8 November 2000 (encl. 119)

4. Affidavit of Asmet Nasruddin affirmed on 31 October 2000 (encl. 116)

5. Affidavit No. 2 of Asmet Nasruddin affirmed on 7 November 2000 (encl. 122)

6. Affidavit No. 3 of Asmet Nasruddin affirmed on 8 November 2000 (encl. 123)

7. Affidavit of Johanan Puthucheary affirmed on 8 November 2000 (encl. 118).

The defendant's opposing evidence are found in:

1. Affidavit of Idris bin Osman (encl. 107)

2. Affidavit of Idris bin Osman affirmed on 31 Octoer 2000 (encl. 108).

For the record there were two other affidavits filed by the plaintiff, namely the plaintiff's affidavit affirmed on 7 December 2000 and the affidavit of Hooi Chew Weai affirmed on 8 December 2000 but I had on 23 February 2001 ruled that same is to be excluded and disregarded for contravention of O. 32 r. 13(2)(b) Rules of High Court 1980 and an abuse of process – *Cheah Thean Swee v. OUB* [1989] 1 MLJ 426.

Before embarking on a scrutiny of the issues raised it is proposed to relate the background history which gave rise to the applications herein. The action herein was fixed for hearing on 16 and 17 October 2000. When the case was called up for hearing on the morning of 16 October 2000 at 12 noon the plaintiff and her counsel were absent. The defendant's counsel was present together with the defendant and his witnesses and the defendant's counsel informed the court that he is invoking O. 35 r. 1(2) of the Rules of the High Court 1980 and requested that the claim against the defendant be dismissed and the defendant be permitted to proceed with the trial of the counterclaim.

In making the application under O. 35 r. 1(2) aforesaid the counsel for the defendant submitted that the case had been fixed earlier on three occasions and the plaintiff had on two out of the three occasions applied for adjournment. He further submitted that the defendant had assembled all his witnesses and had incurred considerable expenses in securing the attendance of one of his witness who resides in England and that he was ready to proceed with the trial both in respect of his defence to the plaintiff's claim and also in the prosecution of his counterclaim.

After hearing the submission of learned counsel for the defence this court allowed his application and accordingly ordered dismissal of the plaintiff's claim with costs.

In respect of the counterclaim the court ordered the defendant to proceed with the trial of the counterclaim and he accordingly took the stand and gave evidence on oath in respect of the counterclaim. The evidence adduced reveals an overpayment of the liquidated sum of RM507,999.50 which evidence was corroborated by the evidence of the defence second witness, Mr Upali Masacorale.

Based on the evidence adduced the court found that the defendant had proven its case on the counterclaim and accordingly entered judgment for the defendant in the sum of RM507,999.50 as claimed in the counterclaim together with interest at the rate of 8% per annum from date of judgment until settlement and costs.

Coming back to the applications herein the grounds as advanced by the plaintiffs in support of their application as deducible from the affidavits filed can be summarised as follows:

The plaintiff and her solicitors were at all material times genuinely and honestly under the impression that the trial of the above action was fixed on 17 October 2000 and 18 October 2000 and acted accordingly.

The disparity of the hearing dates arose because of a miscommunication and/or misunderstanding of the trial dates when the same were communicated to the plaintiff's solicitors by another firm of solicitors instructed by the plaintiff's solicitors who had attended the mention when the relevant trial dates were fixed.

The plaintiff's counsel were present in Johor Bahru on 16 October 2000 preparing for the trial which they had understood to be on 17 October 2000 and 18 October 2000.

The plaintiff and her counsel were unaware that this honourable court had called the above matter for trial on 16 October 2000 and had disposed the plaintiff's claim and had given judgment on the counterclaim until plaintiff's counsel contacted the defendant's counsel at 4pm on 16 October 2000.

The absence of the plaintiff and her counsels from court on 16 October 2000 was neither intentional nor contumelious.

The plaintiff and her counsels were not contacted by the solicitors for the defendant on 16 October 2000 to either ascertain or inquire as to the reasons for the absence before the claim was disposed of and judgment entered under the counterclaim.

In ascertaining the merits of the grounds advanced I cannot be oblivious to the fact that trial had originally been fixed for hearing on 17 and 18 June 1999 but was vacated and a new trial date given on 16, 17, 18 and 20 December 1999 at the request of plaintiff on the ground that she wanted to engage new solicitors. Then again at the request of plaintiff the trial dates fixed on 16, 17, 18 and 20 December 1999 was vacated and new dates given on 9 and 10 May 2000.

The trial dates scheduled on 9 and 10 May 2000 was vacated at the initiative of the court and the trial dates of 16 and 17 October 2000 was given.

It is pertinent at this juncture to emphasise that at the mention before the learned judge on 4 May 2000 when the trial dates of 9 and 10 May 2000 was vacated and the trial dates of 16 and 17 October 2000 was given both the plaintiff's counsel's representative one Mr Johanan Puthucheary and the defendant's counsel were present and as such there can be no denial that the parties were sufficiently notified of the trial dates of the action herein.

It was against the background aforesaid that the court in pursuant to the provisions of O. 35 r. 1(2) RHC recorded the judgment dated 16 October 2000 dismissing the plaintiff's claim with costs and entering judgment against the plaintiff on the counterclaim with interest and costs which judgment is the subject matter of the applications herein.

The relevant provisions relied upon by the plaintiff in relation to her applications are O. 35 rr. 1 and 2 of the Rules of the High Court 1980 (RHC).

Order 35 r. 1 of the RHC reads as follows:

> 1) If, when the trial of an action is called on, neither party appears the action may be struck out of the list without prejudice however, to the restoration thereof, on the direction of a Judge.
>
> 2) If, when the trial of an action is called on, one party does not appear the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.

Order 35 r. 2 of the RHC provides:

> 1) Any judgment or order obtained is called on, one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.

2) An application under this rule must be made within seven days after the trial.

It cannot be disputed that the court is seised with wide discretion in applications under O. 35 r. 2 of the RHC but as in all discretion it is not an unprincipled one. In *Burgoine v. Taylor* [1878] 9 Ch D 1 at 5, the English Court held that any judgment or order given in the absence of a party to the suit may be set aside at the discretion of the court who will look into the reasons for the party's absence. In such circumstances where the judgment or order is set aside, the court may order the party in default to pay the costs thrown away: *Cockle v. Joyce* [1877] Ch D 56. If the court is satisfied that a party has a reasonable explanation for not appearing when the suit was called on and the claim shows some merits, if justice can be done by compensating the other side for any costs thrown away, the court is bound to set aside the judgment an order a new trial: *Buga Singh v. Koh Bon Keo* [1967] 1 MLJ 16.

Applications for setting aside judgments can be broadly classified under two main categories:

a) those in which judgment is given in default of appearance or pleadings or discovery

b) those in which judgment is given after trial in the absence of the party who later applies to set it aside.

Different considerations apply for each of the categories. In the second category, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed. In the leading English authority of *Shocked v. Goldschmidt* [1998] 1 All ER 372 the Court of Appeal held that on an application to set aside a judgment given after a trial in the absence of the applicant, the predominant consideration of the court is not whether there is defence on the merits but the reason why the applicant was absent. If the absence was deliberate and not due to an accident or mistake, the court would be unlikely to allow a rehearing. The English Court of Appeal laid down eight general indications or propositions for the court's evaluation in exercising its discretion. Leggatt LJ at p. 381 in laying down the proposition stated:

> These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or 'general indications' as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing

at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial or matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

Contrasting the cases in the two categories it seems to me that whereas in the first the court is primarily concerned to see whether there is a defence on the merits, in the second the predominant consideration is the reason why the party against whom judgment was given absented himself.

From the proposition enunciated it is clear that though the predominant consideration is the reason behind the applicant's absence nevertheless it is not the sole consideration and hence invariably the courts has to evaluate the other considerations in the exercise of its discretion. The evaluation of the several considerations aforesaid was reaffirmed and applied in *Malayan Banking Bhd v. Syed Mansor Syed Salim* [1999] 6 CLJ 578 where the court stated:

In application to set aside judgment given after a trial in the absence of the applicant the predominant consideration for the court is not whether there is defence on merits, but the reason why applicant was absent. Other considerations are:

i) Whether setting aside the judgment would entail a complete retrial on matters of fact which have already been investigated by the court.

ii) Whether the applicant has real prospects of success.

iii) Whether there was delay in applying to set aside and if so, whether the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

iv) The conduct of the applicant.

v) Whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequence.

vi) Public interest in there being an end to litigation.

Being appraised of the legal principles I shall now proceed to evaluate the evidence as borne out by the affidavits to ascertain whether the Plaintiffs have adequately satisfied the various factors above for the courts discretion in setting aside the judgment obtained to be moved in her favour.

The primary reason advanced by the plaintiff for her absence on the hearing date on 16 October 2000 was the miscommunication and/or misunderstanding as to the trial dates by the solicitor (Mr Johanan Puthucheary) who attended the mention on 4 May 2000 to obtain the trial dates which consequently resulted in her and her solicitors being under the mistaken impression that the case was fixed for trial on 17 & 18 October 2000 and not 16 & 17 October 2000.

She purports to support her reasoning by adverting to the affidavits of Mr Johanan Puthucheary in encl. 118 and Mr Asmet Nasruddin in encl. 122.

Mr Johanan Puthucheary who attended the mention on 4 May 2000 to obtain the hearing dates in his supporting affidavit in encl. 118 avers that he communicated the trial dates obtained from the court through the telephone on 4 May 2000 but due to the elapsement of time he is unable to confirm the exact dates of the trial that he obtained.

Mr Asmet Nasaruddin in his affidavit in encl. 122 confirms receipt of the telephone call from Mr Johanan Puthucheary in respect of the trial dates and accordingly recorded it down in his diary.

Upon scrutinizing the two affidavits aforesaid I am of the view that the evidence of Mr Johanan Puthucheary who is the plaintiff's solicitors agent does not in any way confirm the miscommunication of the wrong dates. No where in his affidavit did he affirmatively assert the miscommunication of the actual hearing date of 16 and 17 October 2000 as fixed by the court and recorded in the court's file. The recording of the wrong dates by Asmet Nasruddin in the face of the non-positive assertion by Johanan Puthucheary of the miscommunication of the trial dates goes towards establishing that the mess or confusion was entirely that of the plaintiff's solicitors and hence being creators of their own misfortune they must face the consequences that arise from their actions. Aggravating the confusion is the plaintiff's letter of 7 November 2000 exhibited as AN4 in Asmet bin Nasruddin's affidavit in encl. 123 which alluded to non-recollection of the communication of not two

trial dates but to three or four trial dates as specified therein. This self created confusion cannot be termed an accident or mistake and hence must surely seal the fate of the plaintiff in attempting to persuade the court to exercise its discretion in her favour.

Compounding the self created confusion is the rather defiant and unremorseful attitude of the plaintiff in failing to acknowledge in any of the supporting affidavits filed that her solicitors obtained and or recorded the wrong dates. She even went to the extent of imputing blame on the defendant's solicitors for not complying with r. 56 of the Legal Profession (Practice & Etiquette) Rules 1978 and contacting her solicitors prior to obtaining judgment. This attitude of blaming every other person except herself does not augur well for somebody who request the sympathy of the court. Rule 56 of the Legal Profession (Practice & Etiquette) Rules 1978 has no application in such a situation and there is no etiquette requiring the Defendant's solicitor to inform the plaintiff or her counsel in the circumstances of the factual matrix herein.

Again the plaintiffs attempt to justify that their recording of the wrong dates was a genuine and honest mistake by adverting to the letter of enquiry dated 13 October 2000 addressed to the Senior Assistant Registrar of the Johor Bahru High Court exhibited as "AN3" in encl. 122 cannot be sustained for the reason that there are several factual untruths in the contents therein. The first factual untruth is that the last judge that handled the file was YA Dato' Abdul Kadir bin Musa and not YA Puan Zainun binti Ali. Further and more importantly there was never any transfer of the case to any other courts as the case remains recorded in the list of cases fixed in court no. 1 and hence it is indeed puzzling for the plaintiffs counsel to serve notice for proper directions as to which of the judges named therein is to hear the case bearing in mind that any transfer of cases can only be effected by the honourable the chief judge Malaya. The contents of the letter which was sent some three days before the trial date is in my view a blatant attempt to frustrate the hearing more so when there are no reasons given.

On the plaintiff's solicitor's contention that on 16 October 2000 they were down in Johor and were ready willing and able to conduct its case, sad to say the contemporary conduct of the plaintiff and her solicitors is not supportive and in fact proves the contrary.

The contemporary conduct of the plaintiff and her solicitor clearly establishes that as at 16 October 2000 there was no bundle of pleadings and bundle of documents in the court's file nor was their any witnesses of the plaintiff present in court. The failure as such amounts to non-compliance with Practice Note No. 3 of 1970 which governs practice directions regulating trial.

Practice Note No. 3 of 1970 provides as follows:

FEDERAL COURT OF MALAYSIA
Practice Note No 3 of 1970
Agreed Bundle of Documents

Because the majority of legal practitioners neglect, either from indolence or ignorance, to avail themselves of the provisions of RSC Order 32, the following directions are issued by the Honourable the Chief Justice to stop further wastage of the court's time.

1. These directions will apply to all claims, whether or not arising out of road accidents.

2. An agreed bundle of documents shall in all cases be filed at least seven (7) days before the trial of the action, comprising all relevant documents the authenticity of which is not challenged. Proof of any such document by 'formal production of the original or a copy thereof (or by) any witness tendering it or producing it in court' is unnecessary, notwithstanding the views expressed by the Judge in (1970) 2 MLJ at page 140. This decision is given pursuant to Order 37 rule 1B(2)(c). The object of thus obtaining admissions is to preclude the necessity of formally proving documents or facts admitted; any party unreasonably refusing or neglecting to admit any document or facts, when called upon do to so – whether pursuant to a notice to admit or to agree the inclusion of any document in an agreed bundle of documents – may be ordered to pay the costs of proof occasioned thereby.

3. A statement of agreed facts shall, wherever possible, be filed at the same time as the agreed bundle of documents, in order to save time and costs by dispensing with the production of witnesses called merely to testify to facts which are not in dispute or likely to be disputed.

4. Legal practitioners are reminded:

   a) that failure to comply with the directions contained in Practice Note No 1 of 1969 will result in trial Judge or special President of the Sessions Court refusing to try the case on the date fixed and all costs of and incidental to the postponement may be ordered payable by the practitioner or practitioners responsible therefore;

I would like to emphasise that the practice note aforesaid was **introduced specifically to prevent indolent or ignorant legal practitioners** from wasting the court's time (emphasis added) and plaintiff's counsel herein falls within the category of solicitors targeted. Further it is to be observed that both the plaintiff and defendant had as early as October and November 1996 respectively affirmed the affidavits in respect of the various documents and in fact both the plaintiff & defendant's solicitors had inspected and exchanged

the documents as far back as 2 December 1996 – see affidavit in encl. 108. However ten days before the hearing ie, on 6 October 2000 the plaintiff in exh. YT1 in encl. 95 wrote a letter to the plaintiff's first solicitor M/s Riza Leong who had dropped out of the picture in June 1999 with copy to M/s Kuok & Puthucheary requesting for documents to be included in the bundle.

From the sequence of events it cannot be disputed that the plaintiff's solicitors had more than one year to obtain the documents from M/s Riza Leong and or Kuok & Puthucheary and about five months after the mention date on 4 May 2000 fixing the trial dates to file in the relevant bundle of documents but owing to their lackadaisical attitude no bundle of documents was present in the court's file at the date of hearing on 16 October 200 which leads me to conclude that the plaintiff is clearly not ready able and willing to proceed. The failure of counsel to appear on the mention date is done at his own peril. Counsels should place equal importance on mention dates and hearing dates; they must appear on both occasions – *Mohd Yusof Mohamad v. Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866.

Though as I have stated above the predominant consideration is the reasons behind the absence on the hearing date, nevertheless that does not mean that the other consideration are unimportant. In point of fact even in the case of *Shocked v. Goldschmidt* the question of merit was a factor which the court took into consideration to be weighed against the reason for the delay. The court at p. 379 stated:

> These cases relating to default judgments are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party.
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> The first of the cases cited about setting aside judgment after a trial was *Grimshaw v. Dunbar* [1953] 1 All ER 350, [1953] 1 QB 408. In it Jenkins LJ referred directly to *Evans v. Bartlam* [1937] 2 All ER 646, [1937] AC 473 only for Lord Atkin's comment that it must be material for the judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. Jenkins LJ referred also to delay prejudicing the other party and the question whether the other party would be prejudiced by an order for a new trial, before concluding, [1953] 1 All ER 350 at 355, [1953] 1 QB 408 at 416.

From the evidence it cannot be denied that the several requests for postponement emanated from the plaintiff. They keep changing solicitors and curiously enough around the time when the action is scheduled for trial and is clearly reflective of their intention to delay conclusion of the case. Their

indolent attitude is reflected also by their writing to the plaintiff's solicitors first in point of time instead of their immediate predecessor and the conduct aforesaid falls within the ambit of the principle established in *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417 which was referred to in *Omega Securities Sdn Bhd v. Public Bank Bhd* [1999] 1 CLJ 216 where the court stated at p. 220:

> The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution ... once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.

In the context of the present case I have already investigated on matters of fact and hence the setting aside of the judgment herein would entail a complete retrial on matters which have been adjudicated by the court and is a factor not to exercise my discretion. Again upon consideration of the question whether the applicant has real prospects of success, the answer would be in the negative for reason that there is ample evidence and corroboration of same of the overpayment of the amount as claimed in the counterclaim.

I now come to the other factor to be considered, namely whether there is any prejudice to the defendant if the application is allowed. The evidence adduced clearly shows that the plaintiff was guilty of not prosecuting the claim expeditiously. Her request for postponement every now and than and the failure of file in the bundle of documents coupled with the non-averment in any of the affidavits filed that the maker of the documents are able and willing to testify establishes that the plaintiff is not ready for trial to prosecute her claim or defend the counterclaim. Against this is the unrebutted evidence of the Defendant appearing in para. 6 of his affidavit in encl. 108 where he avers that he had his witnesses (including his overseas witnesses) ready for trial on all three occasions fixed for trial more so because of the plaintiff's solicitors letter of 13 December 1996 requesting defendant to strictly prove his documents. Further the defendant avers that he is suffering from heart problems and hence it is highly prejudicial for him to have the matter delayed any longer and his profession as a stockbroker would be psychologically affected by any delay.

From the evidence adduced I find that the factor of prejudice would clearly operate and would gravely prejudice the defendant herein from having the matter delayed – and hence is another factor against awarding the plaintiff the discretionary relief prayed for herein.

In the case of *Negara Properties Sdn Bhd v. Arkitek Bersekutu Malaysia* [1996] 2 CLJ 923 – it was held that a plaintiff must prosecute her action expeditiously as inordinate and inexcusable delay would give rise to a substantial risk that it is not possible to have a fair trial, or is likely to cause or to have caused serious prejudice to the defendant. Again solicitors mistakes are not excusable - In *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 the learned judge therein Zakaria Yatim J thoroughly considering all the three English authorities of *Schafer v. Blyta* [1920] 3 KB 140; *Gathi v Shoosmith* [1939] 3 All ER 916; and *Palata Investments Ltd & Ors v. Burt and Sinfield Ltd & Ors* [1984] 1 MLJ 188 nevertheless stated that he is bound by the Federal Court decision in *Tractor's Malaysia Berhad v Southern Eastern Sdn Bhd & Anor* [1984] 1 MLJ 118 in arriving at his decision that solicitor's mistakes are not excusable.

In *Delcont (M) Sdn Bhd v. Motor Sport International Ltd* [1996] 1 CLJ 450, the wrong entry of the dates in counsel's during is held to be inexcusable.

To summarise the position it is my judgment that from the available evidence the plaintiff has failed to satisfactorily show that her absence was accidental and due to a mistake. The lackadaisical attitude and contemporary conduct in the particular circumstance of the case herein cannot support her reason that her absence was not intentional and contumelious. In any event though the absence factor is a relevant consideration nevertheless it is not the sole or decisive consideration as other factors have to be considered by the court. On the merits – there is no supporting evidence of merit shown in the application to set aside and the absence of same is fatal to the plaintiffs application – *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348. On the plaintiff's immediate response in applying to set aside though I concede that the plaintiff acted rather promptly nevertheless it cannot count positively in favour of acceding because of her contemporary conduct which makes her undeserving of the court's sympathy. The factor of prejudice to the defendant with the sword of Damocles hanging over his head all these years is again a consideration which goes against accommodating the plaintiff and public interest demands that there be a finality to litigation more so after an adjudication has been made on the matter.

I now come to the question on whether the perfection of the draft order was in breach of the provisions of O. 42 r. 8 of the Rules of the High Court.

It is the plaintiff's counsel submission that the defendant's counsel had failed to adhere to the explicit requirement of r. 8 of O. 42 Rules of the High Court by forwarding the draft to the registrar for approval when they had notice of the plaintiffs request for appointment with the registrar to clarify the terms of the order given. The plaintiff's counsel action of forwarding the draft for the registrar's approval has deprived the plaintiff of its rights under the Rules. Further the plaintiffs submits that the order is invalid for failure to comply with form 79(K) of the Rules of the High Court.

Order 42 r. 8 of the Rules of the High Court 1980 reads as follows:

(1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within two days of the receipt thereof, or within such further time as may in any case be allowed by the registrar, return such copy with his signed consent or any required amendments thereto.

(2) When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.

(3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the registrar, of which notice shall be given to the other, to settle the terms of the judgments or order.

(4) Every judgment or order shall be settled by the registrar, but in the case of a judgment or order made by a judge, any party may require the matter in dispute to be referred to the judge for his determination.

(5) Where the other party has no solicitor, the draft shall be submitted to the Registrar.

Order 42 r. 8 regulates the procedure to be adopted by litigants in the preparation of judgment and orders. It prescribes the responsibility of the solicitor of the successful party to prepare and forward the draft to the other party, the time frame for approval by the other party and the consequences for failure to return the draft within the time period, and the mechanism for appointment with registrar/judge for settlement of the terms of the draft order or judgment which the parties are unable to agree upon.

Before embarking upon an expose of O. 42 r. 8 it is pertinent to relate to the correspondence passing between the respective solicitors in connection with the draft order.

The defendant's solicitors had *vide* letter dated 17 October 2000 forwarded the draft orders to the plaintiffs solicitors. The plaintiffs solicitors on the very next day ie, 18 October 2000 promptly replied via fax and courier (Exhibit

Idris 14 in encl. 108) and returned the draft orders, deleting the whole of the draft orders and endorsing thereon the words "duly amended" and in conveying their objection to the draft orders requested defendant's counsel to fix an appointment with the registrar to resolve same.

The defendant's solicitors upon receipt of the draft orders immediately *vide* letter dated 19 October 2000 (Exhibit Idris 15 in encl. 108) forwarded the drafts which were deleted by the plaintiff's solicitors to the Senior Assistant Registrar for her approval who consequently endorsed her approval on 20 October 2000.

Having related the sequence of events in connection with the draft orders I shall now address my mind to the requirements of O. 42 r. 8 to ascertain whether same has been complied with by the parties.

It is interesting to note that under O. 42 r. 8(1) the party who receives the draft order "shall within two days or within such further time ... as allowed by the registrar, return such copy with his signed consent or any required amendments thereto."

The wording of the sub-rule aforesaid is explicit and unambiguous in that the receiving party can only do one of two things to the draft, namely either consent to it or amend it. I would like to emphasise that the rule uses the word amend and hence the question arises whether amendment includes deletion which was what happened to the draft in this case which was deleted in toto by the plaintiff's solicitors.

The word "amendment" is defined in "*A Concise Law Dictionary*" by PG Osborn as "the correction of some error or omission, or the curing of some defect in judicial proceedings." The definition as such would clearly exclude total deletion as was done herein and it is my judgment that the plaintiff's solicitors in deleting the draft orders *in toto* have not amended same and hence have failed to adhere and comply with the requirements of the sub-rule.

Having failed to comply with the requirements of O. 42 r. 8(1) the plaintiff's solicitors cannot avail himself of having the matter being settled by the registrar/judge as prescribed by sub-r. (3) as the prerequisites for settlement before the registrar/judge has not been fulfilled by him.

He cannot insist that the draft orders be fixed for settlement by the registrar/judge when the deletion *in toto* cannot by any stretch of imagination be termed as amendment. It is indeed audacious for them to ask for an appointment on a subject matter the pre-requisites of which they have totally failed to perform and comply.

It is also pertinent to emphasise that the defendant's solicitors in submitting the draft order to the registrar *vide* their letter of 19 October 2000 clearly highlighted that the draft order was cancelled by the plaintiff's solicitors and the registrar must have been taken that factor into consideration when she approved same as the terms in the draft is in accordance and is reflective of the order granted by me.

The right to clarify the terms of an order as enshrined in O. 42 r. 8(3) of the RHC is a legal right exercisable only to a party who has fulfilled and complied strictly with the express requirements thereto. The plaintiff is to be solely blamed for the misfortune created by her own doing and hence has forfeited her legal rights.

I shall now address the plaintiff's complaint that the draft order was not in compliance with form 79(K) of the Appendix A of the RHC and hence ought to be set aside as the court is not *functus officio* over the unperfected order.

Order 1 r. 7 of the RHC provides as follows:

> The forms in Appendix A shall be used where applicable with such variation as the circumstances of the particular case require.

Again the wording is explicit and unambigious and before analysing the effect thereof I must express my utter disappointment with counsel for the plaintiffs for omitting the words "such variations" in their reference to O. 1 r. 7 of the RHC in their outline submission which omission the reason behind I would not like to speculate would totally give rise to the inference that the forms are to be followed strictly, which is clearly not the case.

The wording itself is that the forms are to be used as a guide and not to be applied blindly – variations are permissible and indeed encouraged if the circumstances so require.

Mallal's in his book *Supreme Court Practice* at p. 7 in commenting on permissible variations of O. 1 r. 7 stated:

> Variations required by the circumstances of a particular case are permitted. Strict and slavish adherence to form and rules is deplored as it can sometimes hinder the administration of justice, but the forms and the rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice – *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 120; *SA Andavan v. Registrar of Titles Negeri Sembilan & Ors* [1977] 2 MLJ 220.

In point of fact any deviation from forms prescribed by any written law or rules does not have the consequential effect of invalidating it and the position

is clearly spelt out by s. 62 of the Interpretation Act 1967 which prescribes as follows:

> Section 62: Deviation from forms.
>
> Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

Since deviation from the form does not invalidate it O. 2 Rules of High Court which deals with non-compliance in no uncertain terms stipulates that non-compliance amounts to an irregularity. In *Soo Lina v. Ngu Chui Chingon* (*Chong Oi Khiem Irene, Co-respondent)* [1992] 2 MLJ 870 where the respondent objected to the wrong usage of forms as prescribed by the Divorce and Matrimonial Proceedings Rules 1980, the court held that it amounted to an irregularity that was curable by O. 2 of the Rules of the High Court and in view of s. 62 of the Interpretation Act 1948 the usage of the wrong form had no substantial effect and not calculated to mislead. By reason thereof the *functus officio* argument does not arise for consideration.

The power entrusted to the court to do justice is such that it has a discretion to amend mistakes or omissions in the judgment as long as the mistake had not caused any injustice – *Lee Tain Tshung @ Lee Thien Chiung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15 and the sequence as related above does not establish any injustice to the plaintiff.

For the reasons adumbrated above I have no reservations in dismissing both encls. 92 and 96 with costs.